United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2392

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S
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PHILIP A. FERRATO, individually and as President of the New York State Parkway Police Benevolent Association of Long Island, Inc., and the NEW YORK STATE PARKWAY POLICE BENEVOLENT ASSOCIATION OF LONG ISLAND, INC.,

Plaintiffs-Appellants,

-against-

MALCOLM WILSON, as Governor of the State of New York, and the STATE OF NEW YORK PUBLIC EMPLOYMENT RELATIONS BOARD,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of New York

BRIEF OF DEFENDANT-APPELLEE
NEW YORK PUBLIC EMPLOYMENT RELATIONS BOARD

MARTIN L. BARR
Attorney for Defendant-Appellee
State of New York Public Employment
Relations Board
Office and P.O. Address
Public Employment Relations Board
50 Wolf Road
Albany, New York 12205
Telephone: (518) 457-2678

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UNITED STATES COURT OF APPEALS
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STATEMENT OF THE ISSUES

1. Does the complaint state a claim upon which relief can be granted? The court below answered in the negative.

2. Was the complaint filed within the time limited therefor? The court below answered in the negative.

3. Is the complaint barred by the rule of res judicata? The court below answered in the affirmative.

4. Did the plaintiffs-appellants fail to exhaust their state judicial or administrative remedies? The question was not reached by the court below.

5. Did the plaintiffs-appellants fail to join an indispensable party to this action? The question was not reached by the court below.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Northern District of New York which dismissed the complaint herein pursuant to Rule 12(b) in an action brought by the plaintiffs-appellants (hereinafter Association) pursuant to 28 USC §1343(3) and 42 USC §1983 alleging a violation of the Association's civil rights under the Fifth and Fourteenth Amendments.

STATEMENT OF FACTS

On November 27, 1968, pursuant to §§205.5 and 207 of Article 14 of the Civil Service Law (the Taylor Law) and Part 201 of its Rules and Regulations, the PERB determined there should be five bargaining units of employees of the State of New York (In the Matter of State of New York, 1 PERB 3226). The five units determined by PERB to be appropriate included a Security Services Unit

comprising, inter alia, ". . . occupations involving the protection of persons and property; the enforcement of laws, codes, rules and regulations concerned with security and highway safety . . ." (at page 3232). This determination was thereafter challenged by the Civil Service Employees Association, Inc. (CSEA) but was ultimately confirmed by the New York Court of Appeals in CSEA v. Helsby, 25 NY 2d 842 (1969).

On February 27, 1969, PERB issued a determination defining more precisely the make-up of the Security Services Unit and included therein the Long Island State Parkway Police (2 PERB 3313). Subsequently an election was held among the employees in the unit as the result of which Security Unit Employees Council, AFSCME, AFL-CIO, now known as Security Unit Employees, Council 82, AFSCME, AFL-CIO (Council 82), was certified by PERB as the bargaining representative for the employees in that unit on September 22, 1969 (2 PERB 3484).

In March, 1970, the Association instituted an action in State Supreme Court challenging the placement of the Long Island State Parkway Police in the Security Services Unit. This action was dismissed by the Supreme Court, Albany County, as barred by the statute of limitations

and because the PERB determination had previously been confirmed in CSEA v. Helsby, supra, (Rupp v. Klein, unreported, Sup. Ct., Albany Cty, June 15, 1970). An Association attack on the constitutionality of §207, based on this same unit determination by PERB, was also dismissed (Rupp. v. Rockefeller, Sup. Ct., Albany Cty, January 22, 1971, reported at 4 PERB 7084). No appeal was taken from either of these determinations.

On September 13, 1970, the Association, through its then president, mailed to PERB a petition for decertification of Council 82 as bargaining representative for the Long Island State Parkway Police and certification of the Association as their bargaining representative. On September 16, 1970, this petition was returned to the Association without having been processed by PERB, because it was not timely under the PERB Rules. This action was taken following a telephone conversation between the PERB Director of Public Employment Practices and Representation and the Association's attorney in which the issue of timeliness was discussed. The "decision" of the Director which accompanied the returned petition is attached hereto as Exhibit A. This is the decision alluded to in Paragraph 14 of the complaint wherein the

Association makes the conclusory allegation that PERB "reviewed the issues raised in said petition and concluded that decertification would not be permitted." The Association made no attempt to seek administrative or judicial review of the rejection of its petition.

On August 26, 1971, CSEA filed a timely petition for decertification of Council 82 and certification of CSEA as bargaining representative for the Security Services Unit. Thereafter an election was held, and Council 82 was again certified as bargaining representative for that unit. Section 201.7 of the PERB Rules (4 NYCRR §201.7)(these rules have subsequently been amended but remain essentially the same) permitted an employee organization such as the Association to intervene in the representation proceedings so commenced by CSEA to challenge the appropriateness of the unit sought to be represented. The Association did not intervene, nor did it, pursuant to Part 201 of the Rules, file its own timely petition for decertification of Council 82.

Subsequently, Council 82 and the State of New York entered into a collective bargaining agreement for the period April 1, 1972 to March 31, 1974. Under PERB Rule 201.3 (4 NYCRR §201.3) a timely petition for decertifi-

cation could again have been filed by the Association during August, 1973. No such petition was ever filed nor was any petition for decertification filed by an employee organization. Thus, Council 82 maintained its exclusive representative status and has entered into an agreement with the State of New York covering that unit for the period April 1, 1974 to March 31, 1977. A timely challenge may be made to that representative status in August, 1976.

On March 27, 1974, the Association filed the complaint in the instant matter. Upon the motion of both defendants (14a), the complaint was ordered dismissed on July 31, 1974 (20a).

ARGUMENT

POINT I

THE COMPLAINT STATES NO CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Prior to the enactment of Article 14 of the Civil Service Law, commonly known as the Taylor Law, in 1967 (L. 1967, ch. 392), public employees in the State of New York had no right under the law to be represented by employee organizations in collective negotiations with their governmental employers. (N.Y. Labor Law, §715; Rogoff

v. Anderson, 34 A.D. 2d 154, 156-157, aff'd 28 N.Y. 2d 880, app. dism. 404 U.S. 805; Security Unit Employees v. Rockefeller, 76 Misc. 2d 435, 439 [1974]; and generally the Final Report of the Governor's Committee on Public Employee Relations, March 31, 1966, upon which the Taylor Law was based.) It has long been established that constitutional and statutory provisions which grant substantial rights to employees in private industry in the area of collective bargaining and resolution of labor disputes are not applicable to public employees (cf. United States v. United Mine Workers of America, 330 U.S. 258 [1947]; Railway Mail Assn. v. Corsi, 326 U.S. 88 [1944]; New York City Transit Authority v. Loos, 2 Misc. 2d 733, affd. 3 A.D. 2d 740 [1st Dept., 1957]; Rankin v. Shanker, 23 N.Y. 2d 111 [1970]).

Accordingly, whatever rights have been extended to public employees under the Taylor Law are statutory rights, which may be exercised within the limits established by the Legislature (cf. Rogoff v. Andersen, 34 A.D. 2d 154, affd. 28 N.Y. 2d 880, app. dism. 404 U.S. 805 [1971]); they cannot reasonably or logically be considered an extension of constitutional or civil rights (Hanover Township

Federation of Teachers v. Hanover Community School Corp., 457 F.2d 456 [7th Cir., 1972]).

Civil Service Law, §202 grants to public employees in New York State the right to "form, join and participate in * * * any employee organization of their own choosing". Section 203 of that statute grants them the right to be represented by employee organizations in negotiations with their employers. Section 207 gives to the PERB the authority and responsibility to define appropriate negotiating units, according to specific criteria, to ascertain the employees' choice of a representative and to certify the chosen or elected representative.

We can assume that the parkway policemen employed by the Long Island State Park Commission have chosen to become members of the Association. What they are asserting here is a claim that their choice of membership in the Association should be enlarged into a federally protected "right" to have the Association represent them in negotiations with their employer.

Reduced to its essence, the claim of the Association is that its members were deprived of a constitutional right by their inclusion within a bargaining unit encompassing

a greater number of public employees than the Association's members rather than a separate unit of their own (Complaint, ¶19; 7a). As correctly stated by the court below "there is no federally recognized right for minority public employees to be allowed their own individual bargaining unit, i.e., there is no denial of property or due process" (23a), cf. Bauch v. City of New York. 21 N.Y. 2d 599, cert. den. 393 U.S. 834; Kraemer v. Helsby, 35 A.D. 2d 297, app. dism. 28 N.Y. 2d 717, cert. den. 404 U.S. 824. Since the question of unit determination per se is governed entirely by state law, having no connection with a matter protected by the Constitution or other federal law, no claim for redress can be asserted under 42 USC §1983 (Association for the Preservation of Freedom of Choice v. Simon, 299 F.2d 212 [2d Cir., 1962]; Dorsey v. NAACP, 408 F.2d 1022, cert. den. 396 U.S. 847; Sigler v. Lowrie, 404 F.2d 659, cert. den. 395 U.S. 940; Ortega v. Ragen, 216 F.2d 561, cert. den. 349 U.S. 940.

POINT II

THE ACTION IS BARRED BY STATUTE OF LIMITATIONS

(A)

As alleged in paragraphs 9 and 10 of the complaint (5a), shortly after its creation (New York Laws of 1967,

c. 392, effective September 1, 1967) the PERB established five negotiating units of State employees and placed the Long Island State Parkway Police in one of those units, namely, the Security Services Unit. The decision establishing five separate units of State employees was made on November 27, 1968 and ultimately affirmed by the New York Court of Appeals in July of 1969. The decision assigning specific positions to the Security Services Unit was made on February 27, 1969. On September 22, 1969, subsequent to the court's affirmance of the PERB unit determination, the Security Unit Employees Council, American Federation of State, County and Municipal Employees, AFL-CIO, now knownas Security Unit Employees, Council 82, AFSCME, AFL-CIO, was certified as the exclusive bargaining representative of the employees assigned to that unit.

In paragraph 19 of the complaint (7a), the Association alleges an unconstitutional deprivation of its rights, "due to the placement of plaintiff within the Security Unit." In paragraph 22 (8a) the "placing in the Security Unit for purposes of collective bargaining" is again set forth as the basis for the action. It is thus readily apparent that in this action the Association is attacking the original unit decision made by PERB. As

indicated above, the PERB action, placing these employees in the Security Services Unit, was completed in February of 1969, more than five years prior to the date of the complaint herein. Even assuming, arguendo, that the date PERB's action became ripe for review was the date of the certification of the AFSCME local, that date was September 22, 1969, approximately four and one-half years prior to the date of the complaint.

It is axiomatic that, in the absence of a statute of limitations in a federal statute creating a federal cause of action, a federal court will apply the statute of limitations of the state in which the court sits, i.e., the statute of limitations which would apply had an action seeking similar relief been brought in the state courts. As set forth in 53 C.J.S. 980:

> . . . in the absence of any specific limitation in the federal statute creating a cause of action, the rule of limitation is to be found in the statutes of the state where the suit is brought.

This rule has been applied uniformly by all federal courts. See Cope v. Anderson, 331 U.S. 461, 91 L.Ed. 1602 (1947); McClellan v. Montana-Dakota Utilities Co.,104 F.Supp 46, aff'd 204 F.2d 166, cert. den. 346 U.S. 825 (1953); Gordon v. Loew's Inc., D.C.N.Y., 147 F.Supp. 398, aff'd

247 F.2d 451 (1957); Beard v. Stephens, 372 F.2d 685 (1967); Bufalino v. Michigan Bell Tel. Co., 404 F.2d 1023, cert. den. 394 U.S. 987, 22 L.Ed. 2d 763 (1968); Jones v. Jones, 410 F.2d 365, cert. den. 396 U.S. 1013, 24 L.Ed. 2d 505 (1969); Saylor v. Lindsley, C.A.N.Y., 391 F.2d 965 (1968), on remand 302 F.Supp. 1174 (1969); Weinberger v. New York Stock Exchange, D.C.N.Y.,335 F.Supp. 139 (1971).

Since neiether 28 U.S.C. §1343 nor 42 U.S.C. §1983, the federal statutes under which this action has been commenced, contains a statute of limitations, we must look at the state statute governing review of PERB action for the limitations statute. As admitted by the Association in paragraph 22 of the complaint, it is ". . . the Taylor Law which initiated the concept of collective bargaining between governmental employers and their employees." It is the same Taylor Law (N.Y. Civil Service Law, Article 14) which created PERB, which granted to PERB its powers, including the power to determine appropriate collective bargaining units in the context of representation disputes, and which, as originally enacted, and applicable in 1969 and 1970, provided that orders of PERB were reviewable under New York Civil Practice Law and Rules, Article 78. (The Taylor Law was amended on June 17, 1971 to provide

that review of PERB orders must be commenced within 30 days [N.Y. Civil Service Law, §213]). Section 217 of the CPLR provides that Article 78 proceedings to review determinations by public bodies, such as PERB, must be commenced within four months of the action to be reviewed. Since this action was not commenced within four years, much less four months, of the PERB action it seeks to review, it must, upon application of the above stated rule, be dismissed.

Even if we could accept the Association's imaginative approach to the decision of PERB's Director of Public Employment Practices and Representation regarding the Associations's September 13, 1970 petition for decertification, to wit, that said decision of September 16, 1970 "reviewed the issues raised in said petition [apparently including the unit appropriateness issue] and concluded that decertification would not be permitted", that decision too falls outside the permissible period within which a review thereof could be taken under the applicable state statute and review of it is barred.

There having been no decisions of PERB relating to the appropriateness of the Security Services Unit subsequent thereto, the complaint properly was dismissed.

(B)

In addition, and assuming, arguendo, that the complaint states a colorable question involving the Association's civil rights under 42 U.S.C. §1983, the court below correctly held that the three-year statute of limitations set forth in New York CPLR §214(2)* constituted a bar to relief, relying upon Romer v. Leary, 425 F.2d 186 (2d Cir. 1970); Rosenberg v. Martin, 478 F.2d 520 (2d Cir. 1973) and Swan v. Board of Higher Education, 319 F.2d 56 (2d Cir., 1963).

POINT III

THE ASSOCIATION HAS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.

In Duffany v. VanLard, 373 F.Sup. 1060 (NDNY, 1973) Judge Port "[r]ecognizing the continuing doubts as to the viability of the exhaustion doctrine", but also recognizing that its death knell has not yet been sounded in this Circuit, dismissed a complaint brought pursuant to

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* In what is apparently a typographical error, the decision refers to CPLR §214(a). There is no such subdivision in the statute.

28 U.S.C. §1343(4) and 42 U.S.C. §1983 on the grounds, inter alia, that the plaintiff had not exhausted, nor even attempted to obtain relief by invoking, the appropriate administrative procedures. Judge Port relied heavily on Eisen v. Eastman, 421 F.2d 560 (1969), cert. den. 400 U.S. 841, 27 L.Ed. 2d 75 (1970), wherein the Second Circuit Court of Appeals upheld the exhaustion doctrine except in those cases "where the administrative remedy is inadequate . . . or where it is certainly or probably futile" (p. 569). In Eisen the court, in referring to and distinguishing several recent Supreme Court decisions which seemingly cast doubt on the exhaustion doctrine, described these cases as ". . . simply condemning a wooden application of the exhaustion doctrine in cases under the Civil Rights Act", and stated:

> [w]e shall need much clearer directions than the [Supreme] Court has yet given or, we believe will give, before we hold that plaintiffs in such cases may turn their backs on state administrative remedies and rush into a federal forum, whether their actions fall under the Civil Rights Act or come under general federal question jurisdiction. (p. 569)

These same Supreme Court cases have also been explained in recent learned opinions by District Judge Noel in Holland v. Beto, 309 F.Supp. 784 (1970); Schwartz v.

v. Galveston Independent School District, 309 F.Supp. 1034 (1970); and Burnett v. Short, 311 F.Supp. 586 (1970).

The Association has not alleged, nor can it, that it has exhausted its administrative remedies before PERB. Its only specific reference to any attempt on their part to invoke PERB jurisdiction and procedures is set forth in paragraphs 13 and 14 of their complaint in the form of the conclusory allegations that a decertification petition was "filed" with PERB and the merits of that petition "reviewed" by PERB. As explained above, that "decision" of PERB (Exhibit A) clearly indicates that PERB procedures were never actually initiated at that time, and no subsequent attempts have been made by the Association to obtain certification from PERB. This failure alone may be sufficient grounds for dismissal of the complaint (Taylor v. New York City Transit Authority, 309 F.Supp. 785 [1970]).

Even if it is assumed, for purposes of argument only, that the Association did, by its 1970 petition for decertification initiate PERB's representation procedures in an attempt to resolve the representation dispute over the inclusion of the Long Island State Parkway Police in the Security Services Unit, it is clear that those procedures were not exhausted at that time. It is equally clear that in August of 1971 and August of 1973, when the Asso-

ciation could have invoked these same procedures, it chose not to do so. No allegations are made in the complaint that the reasons for this failure were that the "administrative remedy is inadequate" or because to do so would have been "certainly or probably futile". It is submitted that no such allegations are made because to do so would itself be futile.

The adequacy of these same PERB procedures was before the New York Court of Appeals in the CSEA case (supra) where, by affirming the PERB decision, the Court also affirmed the adequacy of these procedures. Nor can it be argued that the invoking of these procedures would be a futile gesture by the Association. A review of recent decisions by PERB shows that, where the facts of the situation warrant, a petition for decertification based on unit inappropriateness will be granted by PERB (Matter of City of Oswego, 6 PERB 4009; Matter of UFSD #3 of the Town of Hempstead, 6 PERB 4049).

Since the Association has not exhausted, or even invoked, its administrative remedy, the complaint properly was dismissed.

POINT IV

THE ACTION SHOULD BE DISMISSED FOR FAILURE TO JOIN A PARTY UNDER RULE 19.

The Long Island State Parkway Police, whom the Association seeks to represent by this action, are currently represented in collective negotiations under the Taylor Law by Council 82, and have been so represented since September, 1969. A collective bargaining agreement covering these, and all other employees in the Security Services Unit, has recently been entered into for the period April 1, 1974 to March 31, 1977. Prior to this agreement the terms and conditions of employment of these employees had been provided for in agreements for the periods April 1, 1970 to March 31, 1972 and April 1, 1972 to March 31, 1974. If the relief demanded by the Association, to wit, recognition as exclusive bargaining representative of the Long Island State Parkway Police, is granted, Council 82 will be effectively deprived of its statutory rights provided in §208.1 of the Taylor Law as follows:

> (a) to represent the employees in negotiations notwithstanding the existence of an agreement with an employee organization that is no longer certified or recognized, and in the settlement of grievances; and

> (b) to membership dues deduction, upon presentation of dues deduction authorization cards signed by individual employees.

These rights, accompanying the certification which is currently enjoyed by Council 82, cannot expire, as provided in §208.2, any sooner than "seven months prior to the expiration of a written agreement between the public employer and said employee organization determining terms and conditions of employment." Thus, the rights currently enjoyed by Council 82 would not, under the Taylor Law, be subject to challenge until August of 1976. Council 82 would, of course, be a party to any proceedings challenging its §208 rights.

Since Council 82 has not been made a party to this action and since its rights will be directly affected, in fact, terminated, should the relief requested be granted by the Court, it meets the test for joinder as an indispensable party which was recognized by the United States Supreme Court in Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 102, 19 L.Ed. 2d 936 (1968). In that case, in determining what constituted an indispensable party under Rule 19, the Court stated that they were (at 123-124):

> . . . persons who not only have an interest in the controversy, but an

> interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

In Culinary Workers & Bartenders Union, Local 814 v. Salatich, 318 F.Supp. 1047 (1970), in ruling on a similar motion to dismiss under Rule 12(b)(7), the Court stated that the test of indispensability

> is whether a party having an interest relating to the subject of the action is so situated that the disposition of the action in his absence may as a practical matter impair or impeded his ability to protect that interest. (at 1053).

(See also Ric-Wil, Inc. v. First Pennsylvania Bank & Trust Co., 352 F.Supp. 782 (1973); DeHosenko v. State of New York, 311 F.Supp. 126, aff'd 427 F.2d 351 [1969]). It is undisputable that the granting of the relief demanded by the Association would, in the absence of Council 82, not only "impair or impede [Council 82's] ability to protect" its interests, indeed rights, but would, in fact, eliminate those rights, and would "be wholly inconsistent with equity and good conscience."

CONCLUSION

The order of the court below should be affirmed.

Respectfully submitted,

MARTIN L. BARR
Attorney for Defendant-Appellee
New York State Public Employment
Relations Board
Office and P.O. Address
Public Employment Relations Board
50 Wolf Road
Albany, New York 12205

December 19, 1974

September 16, 1970

Richard Hartman, Esq.
300 Old Country Road
Mineola, L.I., New York 11501

Dear Mr. Hartman:

In accordance with today's telephone conversation, I am returning herewith the undocketed representation petition which you submitted on behalf of your client.

As we discussed, such a petition is clearly not presently timely.

Very truly yours,

Paul E. Klein
Director of Public Employment
Practices and Representation

PEK/gam

Enclosure

EXHIBIT A

STATE OF NEW YORK)
)
COUNTY OF ALBANY)

Bob Kavandy, being duly sworn, deposes and says that deponent is over the age of 18 years and an employee of the New York State Public Employment Relations Board.

That on December 20, 1974 deponent served the within Brief of Defendant-Appellee PERB upon:

Richard Hartman, Esq., Attorney for Plaintiffs-Appellants, 300 Old Country Road, Mineola, New York, 11501

Hon. Louis J. Lefkowitz, Attorney General, State Capitol, Albany, New York, 12224 (Att: John Q. Driscoll)

at the address(es) designated by depositing three copies ~~a true copy~~ thereof enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Bob Kavandy

Sworn to before me this

20th day of December, 1974

Ann Pollak

ANN POLLAK
Notary Public, State of New York
Qualified in Albany County
Commission Expires March 30, 1975

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* Certified mail.